

IN THE MUNICIPAL CRIMINAL COURT OF THE CITY OF TULSA
TULSA COUNTY, STATE OF OKLAHOMA

CITY OF TULSA,)
a municipal corporation,)
)
 Plaintiff,)
)
 vs.)
)
 SAMANTHA SHAFFER,)
)
 Defendant.)

Case No. 6108204
Judge Mitchell McCune

MEMORANDUM AND ORDER

Before the Court is Defendant's Verified Motion to Dismiss for Lack of Subject Matter Jurisdiction (hereinafter "Motion") filed August 10, 2020. The City of Tulsa filed its Response to Defendant's Motion to Dismiss and Brief in Support (hereinafter "Response") on October 30, 2020. The Defendant filed her Reply to City of Tulsa's Response to Motion to Dismiss For Lack of Subject Matter Jurisdiction on December 1, 2020. On December 4, 2020, the City of Tulsa filed its Surreply. On January 4, 2021, the Court conducted a hearing on the Defendant's Motion. At the hearing, the City of Tulsa and the Defendant presented evidence (via stipulations) and argument. I find, for the reasons set forth below, that Defendant's Motion is *denied*.

Stipulations

The City of Tulsa and the Defendant have stipulated to the facts in their respective Motion and Response, except as to the tribal membership of the Defendant, at the time of the citation.

MUNICIPAL COURT
F I L E D
FEB 02 2021

By J. Stephen Clegg Dep.

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1 CHERI HARVELL

Court Clerk for the Municipal Criminal Court,
City of Tulsa, Oklahoma hereby certify that
the foregoing is a true, correct and full copy
of the instrument herewith, set out as filed or
record in the Court Clerk's Office of the
Tulsa Municipal Criminal Court.

24 Aug 2021
Municipal Court Clerk

By Cheri Harrell Deputy

Background

The Defendant, who is an alleged member of the Cherokee Nation, was cited for a violation of Title 27 Section 2003, Larceny of Merchandise from Retailer or Wholesaler – Punishment – Second Offense, of the City of Tulsa Revised Ordinances on September 30, 2019. The alleged offense occurred within the corporate city limits of the City of Tulsa and within the boundaries of the Muscogee (Creek) Nation reservation. The charge was filed on October 8, 2019. On July 9, 2020, the United States Supreme Court decided the case of McGirt v. Oklahoma, 591 U.S. __; 140 S.Ct. 2452; 207 L.Ed.2d 985 (2020).

Analysis

Subject matter jurisdiction is a corner stone to American Jurisprudence. Subject matter jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over the parties. State of Rhode Island v. Com. of Massachusetts, 37 U.S. 657, 9 L.Ed. 1233 (1838).

Generally, state courts do not have jurisdiction to try Native Americans for conduct committed in “Indian County.” Negonsott v. Samuels, 507 U.S. 102, 113 S.Ct. 1119 122 L.Ed. 457 (1993). On July 9, 2020, the U.S. Supreme Court held that land reserved to the Muscogee (Creek) Nation since the 19th century remains “Indian County” for the purposes of the Major Crimes Act and that the State of Oklahoma lacked subject matter jurisdiction over a tribal citizen, wherein the offense occurred within the Muscogee (Creek) Nation Reservation boundaries. McGirt v. Oklahoma, 591 U.S. __; 140 S.Ct. 2452; 207 L.Ed.2d 985 (2020). A majority of the City of Tulsa lies within the Muscogee (Creek) Nation Reservation.

The City of Tulsa Municipal Criminal Court is a court of record of limited jurisdiction. The Court is charged with the adjudication of traffic and misdemeanor violations of the City of Tulsa Revised Ordinances that occur within the corporate city limits. After reviewing the McGirt decision, one might simply assume that the City of Tulsa would lack subject matter jurisdiction over the conduct of Native Americans within the boundaries of the corporate city limits and the Muscogee (Creek) Nation Reservation or “Indian Country,” since the State of Oklahoma lacks subject matter jurisdiction.

Hundreds of cases are currently awaiting a determination of the subject matter jurisdiction question before this court. And, the number of cases continue to rise daily. Applying the assumption that McGirt controls would be a quick, simple and less taxing resolution to the issue before the Court. However, the Court is obligated to review all the facts and apply the law in this, and every other case before the Court. And, upon further review, applying the holding in McGirt to City of Tulsa cases would create an incorrect result.

The U.S. Congress addressed municipal jurisdiction in Indian Country on June 28, 1898, after passing “An Act for the Protection of the People of Indian Territory and for Other Purposes,” 30 Stat. 495 (hereinafter “Curtis Act). Section 14 of the Curtis Act states as follows:

SEC. 14. That the inhabitants of any city or town in said Territory having two hundred or more residents therein may proceed, by petition to the United States court in the district in which such city or town is located, to have the same incorporated as provided in chapter twenty-nine of Mansfield’s Digest of the Statutes of Arkansas, if not already incorporated there under; and the clerk of said court shall record all papers and perform all the acts required of the recorder of the county, or the clerk of the county court, or the secretary of state, necessary for the incorporation of any city or town, as provided in Mansfield’s Digest, and such city or town government, when so authorized and organized, shall possess all the powers and exercise all the rights of similar municipalities in said

State of Arkansas. All male inhabitants of such cities and towns over the age of twenty-one years, who are citizens of the United States or of either of said tribes, who have resided therein more than six months next before any election held under this act, shall be qualified voters at such election. That mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory, and may charge, collect, and retain the same fees as such commissioners now collect and account for to the United States ; and the marshal or other executive officer of such city or town may execute all processes issued in the exercise of the jurisdiction hereby conferred, and charge and collect the same fees for similar services as are allowed to constables under the laws now in force in said Territory.

All elections shall be conducted under the provisions of chapter fifty-six of said digest, entitled " Elections," so far as the same may be applicable; *and all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protection therein.* Such city or town governments shall in no case have any authority to impose upon or levy any tax against any lands in said cities or towns until after title is secured from the tribe; but all other property, including all improvements on town lots, which for the purposes of this act shall be deemed and considered personal property, together with all occupations and privileges, shall be subject to taxation. And the councils of such cities and towns, for the support of the same and for school and other public purposes, may provide by ordinance for the assessment, levy, and collection annually of a tax upon such property, not to exceed in the aggregate two per centum of the assessed value thereof, in manner provided in chapter one hundred and twenty-nine of said digest, entitled "Revenue," and for such purposes may also impose a tax upon occupations and privileges.

Such councils may also establish and maintain free schools in such cities and towns, under the provisions of sections sixty-two hundred and fifty-eight to sixty-two hundred and seventy-six, inclusive, of said digest, and may exercise all the powers conferred upon special school districts in cities and towns in the State of Arkansas by the laws of said State when the same are not in conflict with the provisions of this act.

For the purposes of this section all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory ; and the United States court therein shall have

jurisdiction to enforce the same, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect: Provided, That nothing in this act, or in the laws of the State of Arkansas, shall authorize or permit the sale, or exposure for sale, of any intoxicating liquor in said Territory, or the introduction thereof into said Territory ; and it shall be the duty of the district attorneys in said Territory and the officers of such municipalities to prosecute all violators of the laws of the United States relating to the introduction of intoxicating liquors into said Territory, or to their sale, or exposure for sale, therein: Provided further, That owners and holders of leases or improvements in any city or town shall be privileged to transfer the same. (Emphasis Added.)

The City of Tulsa was incorporated under the provisions of the Curtis Act. After incorporating, the City of Tulsa has repeatedly passed and enforced ordinances. And, pursuant to the Curtis Act, the City of Tulsa has had subject matter jurisdiction to hear violations of its ordinances since 1898.

Following the passage of the Curtis Act, on March 1, 1901, the U.S. Congress passed “An Act to Ratify and Confirm an Agreement with the Muscogee or Creek Tribe of Indians, and for Other Purposes,” 31 Stat. 861, § 41 (1901) (hereinafter “Creek Agreement”). Notably, the Creek Agreement expressly provided for the preservation of Section 14 of the Curtis Act. It states:

41. The provisions of section thirteen of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled “An Act for the Protection of the people of the Indian Territory, and for other purposes,” shall not apply to or in any manner affect the lands or other property of said tribe, or be in force in Creek Nation, and no Act of Congress or treaty provision inconsistent with this agreement shall be in full force in said nation, **except section fourteen of said last-mentioned Act, which shall continue in force as if this agreement had not been made.** (Emphasis added.)

I. THE CURTIS ACT GRANTS THE CITY OF TULSA SUBJECT MATTER JURISIDCITION FOR ORDIANCE VIOLATIONS OVER ALL PERSONS, WITHOUT REGARD TO RACE.

The Curtis Act authorizes municipalities to assert subject matter jurisdiction over all persons, without regard to race, concerning violations of city ordinances. The language set forth by the U.S. Congress is clear and unambiguous.

There are many provisions contained in the Curtis Act. Many have been repealed by Acts of Congress. This Court has found no federal statutes which specifically repeal Section 14 of the Curtis Act. This Court has found no cases that specifically state that Section 14 of the Curtis Act has been repealed.

There are two (2) Curtis Act cases, found by the Court, which were heard by the U.S. Court of Appeals, 10th Circuit. These cases are U.S. v. City of McAlester, Okl., 604 F.2d 42 (10th Cir. 1979) and Choctaw & Chickasaw Nations v. City of Atoka, Okl., 207 F.2d 763 (10th Cir. 1953). Each of these cases dealt with the power granted to municipalities, under the Curtis Act, to condemn land in Indian Country for municipal purposes. In each case, the Court found for the municipalities. Neither case held that the Curtis Act was repealed.

The Defendant asserts that the Curtis Act has been repealed. In support of this position, the Defendant cites Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (1988). The language in Hodel supports the Defendant's contention. However, a closer review of the Hodel decision sheds more light on the subject.

While it is clear that Hodel determined that the OIWA repealed the portion of the Curtis Act dealing with tribal courts, an accurate finding, it is also clear that the Court in Hodel was issue

specific. The Court in Hodel never addressed the multiple provisions of the Curtis Act dealing with municipalities.

The 10th Circuit made it perfectly clear that the Curtis Act had multiple subjects addressed therein. The 10th Circuit held in U.S. v. City McAlester, Okl., the following:

It is true that one principal object of the Curtis Act was the allotment of land to individual Indians. But it is also true that important provisions of the statute concerned the developing cities and towns in the Indian Territory. Section 14 of the same Act, reproduced in part in the Appendix, went to lengths to provide for the creation of cities and towns and the powers to be exercised by them.

U.S. v. City of McAlester, Okl., 604 F.2d at 51 (Emphasis added).

The Court in Hodel concentrated its efforts on the issue of the establishment of tribal courts through the Oklahoma Indian Welfare Act (OIWA), Act of June 26, 1936, 49 Stat.1967 (codified at 25 U.S.C. §§ 501 *et seq.* (1983)). The D.C. Circuit Court specifically ruled on Section 28 of the Curtis Act concerning tribal courts. The Court further held that since OIWA did away with allotment and established a tribal government, it “appeared” the whole subject of the Curtis Act was covered, thus repealing the same. Hodel, 851 F.2d at 1445. Once again, no discussion of municipalities or Section 14 of the Curtis Act was entertained by the Court.

Finally, it is compelling that the OIWA is not silent on the question of the repeal of prior laws. Section 9, of the OIWA provides that only those Acts or parts of Acts that are “inconsistent” with the OIWA are repealed. While, the Hodel decision is persuasive, it is not controlling on this Court.

This Court finds that the Curtis Act grants the City of Tulsa jurisdiction for violations of its ordinances over all persons, without regard to race. This Court further finds that Section 14 of

the Curtis Act is not inconsistent with the OIWA. Finally, this Court finds that the OIWA does not repeal Section 14 of the Curtis Act.¹

II. CONGRESS, THROUGH ITS PLENARY POWERS OVER TRIBAL MATTERS, CAN GRANT MUNICIPALITIES JURISDICTION, EVEN WHEN THE STATE HAS NO SUCH GRANT OF JURISDICTION.

It is undisputed that Congress, alone, has plenary power over tribal matters. While it is a general rule that a municipality may not have power that exceeds that derived from the state, the Supremacy Clause, U.S. Const. Art. VI, cl. 2, authorizes the federal government to grant municipal governments powers or funds. Surprising to many, the Supremacy Clause further empowers Congress to grant powers and/or funds to municipalities, even when such a grant is contrary to the wishes of the state, who created the municipality. See City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 78 S.Ct. 1209. 2 L.Ed.2d 1345 (1958).

In this instance, Congress granted the municipalities in Indian Country power to incorporate, conduct elections, pass of ordinances, enforce ordinances, and create free public schools, to name a few. The powers granted municipalities were clearly designed to empower unified municipalities to grow and grant their citizens rights and privileges, without regard to race.

While some cases state that some powers or funds granted municipalities from the federal government can be blocked if it is expressly forbidden by state law, the Court found no Oklahoma state law which forbids municipalities from enforcing its ordinances against all persons, including tribal members.

¹ In fact, the Okmulgee County District Court, in a recent decision, cited the “Curtis Act” when granting motions to dismiss in favor of municipalities in a civil lawsuit seeking the refund of money (essentially from fines and costs incurred for violation of city ordinances) for Native Americans. See Nicholson, et al., v. Stitt, et al., Okmulgee County District Court, Case No. CJ-2020-00094 (2020). This decision, while persuasive, is not controlling on the Court.

In fact, the Oklahoma Constitution states:

Every municipal corporation now existing within this State shall continue with all of its present rights and powers until otherwise provided by law, and shall always have additional rights and powers conferred by the Okla. Constitution. Okla. Const. Section XVIII-2 (Emphasis added).

The Oklahoma Constitution accounted for the preexisting rights and powers municipalities had prior to statehood.

This Court finds that pursuant to the Supremacy Clause and the supporting case law that the United States Congress had the plenary power to grant the City of Tulsa jurisdiction under Section 14 of the Curtis Act. This Court further finds that the powers granted to the municipalities under Section 14 of the Curtis Act were not dissolved by the Enabling Act or the Oklahoma Constitution.

III. UNDER THE CURTIS ACT DEFENDANTS HAVE AN AVENUE TO APPEAL THIS COURTS JUDGMENTS AND SENTENCES.

Under McGirt v. Oklahoma, the State of Oklahoma would not have jurisdiction to hear an appeal of a Native American who allegedly committed a municipal offense in Indian Country. However, there is a forum for appealing municipal judgments and sentences.

In 1903, in the case of Missouri, K. & T. Ry. Co. v. Phelps, 4 Ind. T. 706, 76 S.W. 285, 286 (Indian Terr. 1903), the Court of Appeals for the Indian Territory stated that the appeal from a case rendered under the Curtis Act would be to the U.S. Federal District Court. Subsequent to the ruling above, the Oklahoma Supreme Court, in 1908, upheld the settled law that an appeal under the Curtis Act would be heard in the United States District Court. Baker v. Marcum & Toomer, 1908 OK 171, 22 Okla. 21, 97 P. 572, 573 (1908).

This Court finds that an appeal forum for violations of municipal ordinances under the jurisdiction granted by the Curtis Act has been established and is supported by case law. Therefore, this Court finds there would be no violation of the Defendant's appellate rights under the Curtis Act.

Conclusion

For the reasons set forth above, this Court finds that Section 14 of the Curtis Act provides the City of Tulsa subject matter jurisdiction over all persons, without regard to race, including Native Americans, alleged to have committed ordinance violations within the corporate city limits of the City of Tulsa and within the boundaries of the Muscogee (Creek) Nation Reservation. Since this Court has found that this Court has subject matter jurisdiction in this case, it is unnecessary to determine the tribal membership status of the Defendant. Accordingly, the Defendant's Motion is *Denied*.

Nothing in this opinion should be read to condone the wretched history of the treatment of Native Americans by the United States government. In the darkness of such treatment, there appeared to be a glimmer of hope in Section 14 of the Curtis Act - the idea that all people would be treated the same way under similar circumstances, without regard to race. For when a government does not apply the law to all citizens without regard to race or even gives the appearance that it does not apply the law to all citizens without regard to race, then the government at a minimum creates disenfranchised citizens or at the most violates constitutional rights, eroding public trust.

ORDER

IT IS ORDERED, ADJUDGED AND DECREED the Defendant's Verified Motion to Dismiss for lack of Subject matter Jurisdiction is denied.

Dated this 2 day of February 2021.



MITCHELL M. McCUNE, PRESIDING JUDGE
TULSA MUNICIPAL CRIMINAL COURT

Certificate of Service

I, the undersigned, do hereby certify that on the 2 day of February 2021, a true and correct copy of the foregoing document was hand delivered, mailed, with proper postage thereon, and/or e-mailed to the following:

Ms. Melanie Lander, Esq.

Mr. Hayes Martin, Esq.

